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FOUNDATION AUTO HOLDINGS, LLC

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

FOUNDATION AUTO HOLDINGS, LLC, a
Delaware limited liability company,

Plaintiff,

vs.

WEBER MOTORS, FRESNO, INC. d/b/a BMW
Fresno, a California corporation; CJ'S ROAD TO
LEMANS CORP. d/b/a Audi Fresno and Porsche
Fresno, a California corporation; and
CHRISTOPHER JOHN WILSON, an individual
and resident of the State of California,

Defendants.

Case No. 1:21-cv-00970-JLT-EPG

ORDER RE: STIPULATED MOTION FOR
LEAVE TO AMEND COMPLAINT

(ECF No. 39).

WHEREAS, on August 3, 2021, defendants Weber Motors, Fresno Inc., CJ's Road to Lemans Corp., and Christopher John Wilson (collectively "Defendants") filed a Motion to Dismiss the Complaint (ECF 7) in the above-entitled action, pursuant to Fed. R. Civ. P. 12(b)(6);

WHEREAS, on September 14, 2022, the Court granted the Motion to Dismiss (ECF 37) and provided leave to amend within 45-days;

WHEREAS, within the Court's Order the Court stated that "Plaintiff alleges facts suggesting that Defendants anticipatorily repudiated the APA but does not allege the elements of an anticipatory breach of contract claim or that Defendants' repudiation excused its nonperformance." ECF 37, p. 9;

1 WHEREAS, the Court's Order provided leave to amend for the purpose of permitting
2 "Plaintiff to cure its deficiencies related to its performance or excuse for nonperformance." *Id.*, p.
3 10;

4 WHEREAS, plaintiff Foundation Auto Holdings, LLC ("Foundation") seeks to amend its
5 Complaint, both to cure any deficiencies related to pleading performance or excuse for non-
6 performance, and to specifically "allege the elements of an anticipatory breach of contract claim"
7 under California law;

8 WHEREAS, the Court's Order does not permit leave to amend to add a cause of action,
9 such that a motion is necessary. *See, e.g., Benton v. Baker Hughes*, No. CV 12-07735 MMM
10 MRWX, 2013 WL 3353636, at *3 (C.D. Cal. June 30, 2013), *aff'd sub nom. Benton v. Hughes*, 623
11 F. App'x 888 (9th Cir. 2015) ("The addition of Benton's new claims therefore exceeds the scope of
12 the leave to amend granted, and it is appropriate to strike the newly added claims on this basis");
13 *Yau v. Deutsche Bank Nat. Tr. Co. Americas*, No. SACV 11-00006-JVS, 2011 WL 8326579, at *2
14 (C.D. Cal. Aug. 31, 2011) ("In order to assert claims that were not asserted in the FAC, Plaintiffs
15 would have had to obtain Defendants' consent or the Court's leave");

16 WHEREAS, the Foundation and Defendants met and conferred pursuant to this Court's
17 Standing Order section I(C), agreed on the form of a proposed First Amended Complaint, and wish
18 to avoid unnecessary motion practice;

19 WHEREAS, Defendants consent to the form of the First Amended Complaint, attached
20 hereto as Exhibit A, and reserve all rights in connection with the same;

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1 NOW THEREFORE, Foundation and Defendants respectfully request the Court order as
2 follows:

3 1. That Foundation be permitted leave to amend its Complaint, both to address the
4 issues raised by the Court in its Order and to add a cause of action for anticipatory breach, a form of
5 this First Amended Complaint being attached hereto as A.

6 Dated: October 28, 2022.

HOLLAND & KNIGHT LLP

8 /s/ Daniel Kappes

9 Daniel P. Kappes

10 Attorneys for Plaintiff
FOUNDATION AUTO HOLDINGS, LLC

11 Dated: October 27, 2022.

MLG Attorneys at Law

13 /s/ Matthew Van Fleet (as authorized on 10/27/2022)

14 Matthew Van Fleet

15 Attorneys for Defendants
16 WEBER MOTORS, FRESNO, INC., CJ'S ROAD TO
LEMANS CORP., and CHRISTOPHER JOHN
17 WILSON

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ORDER

Based on the parties' stipulation (ECF No. 39), IT IS ORDERED that Foundation Auto Holdings, LLC may file its First Amended Complaint, as set forth in Exhibit A to the stipulation, by no later than November 2, 2022.

IT IS SO ORDERED.

Dated: **October 31, 2022**

/s/ Eric P. Grogan
UNITED STATES MAGISTRATE JUDGE